

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 275 of 2013

BETWEEN

FIJI DEVELOPMENT BANK a body corporate having its head office at
360 Victoria Parade, Suva, Fiji

PLAINTIFF

AND

JOSEPH LUM KON WISE of Lot 3 Kaunitoni Street,
Delainavesi, Lami, Businessman.

DEFENDANT

Counsel : Mr. Nand S. for the Plaintiff
Ms. Jackson L. for the Defendant

Date of Hearing : 12th March 2020

Date of Judgment : 27th April 2020

JUDGMENT

- [1] The plaintiff filed the writ of summons and the statement of claim, which was later amended, seeking to following orders:
- a. That the defendant pay the plaintiff the sum of \$195,956.41 (One Hundred Ninety Five Thousand Nine Hundred Fifty Six Dollars and Forty One Cents) with interest accruing thereon at the rate of 9.5% per annum with effect from 1st April 2014 until full payment.
 - b. Costs of this action; and
 - c. Any other reliefs this Honourable Court deems just.
- [2] The plaintiff, on 22nd February 2007 advance a sum of Hundred Thousand Dollars (\$100,000.00) to the defendant. The defendant granted Ship Mortgage No. S2007/2940/1 over vessel MFB "SHOGUN" (the vessel) dated 28th February 2007 and Bill of Sale No. 2007/544 dated 28th February 2007 over Fishing Equipment, Refrigeration Appliances and Navigational Equipment, as security.
- [3] The position of the plaintiff is that although it attempted to find a buyer for the vessel and equipment they could not and the vessel and equipment deteriorated but later it was able to sell the items for \$7000.00 which was credited to the defendant's account.
- [4] The defendant in his statement defendant states that due to the negligence and recklessness the plaintiff could not complete the sale of the vessel for \$110,000.00 and by way of a counter claim seeks to recover \$193,000.00 or to set that amount off against the plaintiff's claim. The defendant also claims general damages for negligence and breach of duty.
- [5] At the pre-trial conference the parties admitted the following facts:
1. That the plaintiff is a corporate body established under section 3 of the Fiji development Bank Act, Chapter 214 with perpetual succession and a common seal empowered to carry on banking business including power to lend money on such terms and conditions it may determine.
 2. That pursuant to loan agreement dated 22nd February 2007 the plaintiff lent and advanced a sum of \$100,000.00 to the defendant.

3. That as security the defendants jointly and severally granted mortgage S2007/2940/1 over vessel MFB "SHOGUN" dated 28th February 2007 and Bill of Sale No. 2007/544 dated 28th February 2007 over Fishing Equipment, Refrigeration Appliances and Navigational Equipment.
4. That the defendant had agreed to repay the said loan to the plaintiff in instalments with interest at the rate of 12% per annum on the first \$325,000.00 and 17.5% per annum on any excess together with bank fees upon disbursement of the loan.
5. That there was a default in loan payment to the plaintiff which caused the loan account No. 115104 to fall into arrears and the plaintiff to issue a Demand Notice demanding payment of total debt dated 13th June 2012.
6. That the plaintiff thereafter exercised its right under the Ship Mortgage and Bill of Sale seized the vessel and advertised it for sale and eventually sold it for a sum of \$7000.00.
7. That the Vessel Shogun Registration Number 000373 remained in the possession of the plaintiff for close to 2 years starting June 2012 to around 31 March 2014.
8. The Vessel Shogun, during the period 7th March 2011 to 7th March 2012, was insured for the sum of \$200,000.00.
9. On 31st July 2012, the plaintiff wrote to the defendant stating that subsequent to the advertisements placed in the local newspapers, the plaintiff had accepted an offer to purchase the Vessel Shogun Registration Number 000373 for the sum of \$110,000.00.
10. On 31st March 2014, the plaintiff wrote to the defendants informing them that they had sold the Vessel Shogun via private sale No. 59/2013(e) for the sum of \$7000.00 plus \$1050.00 VAT.

[6] There is no dispute between the plaintiff and the defendant that the defendant obtained a loan of \$100,000.00 from the plaintiff and the defendant defaulted payment. It is also common ground that as security for the loan the defendant granted Mortgage and Bill of Sale over the vessel and the equipment.

[7] Defendant's position is that after seizing the vessel and equipment the plaintiff did not maintain the vessel and equipment and it resulted in the deterioration of the vessel and

equipment. There is no duty on the mortgagee to maintain the property seized under a mortgage. The defendant in this regard cited the decision in **Funworld Centre (Fiji) Limited v Bank of Baroda** HBC 224 of 2016 where the court made the following observations:

A mortgagee who goes into possession becomes the manager of the charged property. He thereby assumes a duty to take reasonable care of the property. This requires him to be active in protecting and exploiting the security, maximising the return, but with taking undue risks (see: Halsbury's Laws of England 5th Ed Mortgage (Vol. 77 (2016), para 429).

Fiji Development Bank v Chute [1996] FJHC 87; Hbc0547j.94s (4 January 1996) –

Even assuming that the holder of a Bill of Sale owes a similar duty to the borrower/grantor, the parameters of the duty are clearly set out in the judgment of Cross L.J. in the leading case of *Cuckmere Brick Co. v. Mutual Finance Ltd.* (1971) Ch. D. 949 when he said at p.969:

"A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power for the mortgagor for it was given him for his own benefit to enable him to obtain repayment of his loan. On the other hand, he is not in the position of an absolute owner selling his own property but must undoubtedly pay some regard to the interests of the mortgagor when he comes to exercise the power.

Some points are clear. On the one hand, the mortgagee, when the power has arisen, can sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it."

- [8] In that case when the property was handed back to the plaintiff he found certain items were missing and certain other items were damaged. The facts in the case before this court are different to that of the case cited by the defendant. In the instant matter there was no such damage to the vessel. It had been there in the plaintiff's custody for nearly two years and the condition of the vehicle was deteriorated. There is no evidence that

the vessel was damaged due to the negligence of the plaintiff. In fact the plaintiff had appointed a person to look after the vessel.

- [9] The plaintiff seized the vessel and equipment in June 2012 and held it in its custody till March 2014. Evidence of the plaintiff's witness is that the vessel and equipment were advertised for sale and the advertisement was published in the Fiji Sun on 29th June 2012 and in the Fiji Times on 6th July 2012.
- [10] The plaintiff received an offer for \$110,000.00 which they accepted but later the person who made the offer informed the bank that he was no longer interested in the vessel and equipment.
- [11] The vessel and equipment were again advertised 12th October 2012, 16th November 2012, 21st December 2012 and 01st January 2013. The bank received an offer of \$32,500.00 on 22nd February 2013. The bank accepted the offer in writing by letter dated 25th February 2013 but that offer was also withdrawn. Finally, the bank received an offer for \$7000.00 and the vessel and equipment were sold for that price.
- [12] It is therefore clear that the plaintiff has made every attempt to sell and obtain the maximum price for the vessel from the time it was seized.
- [13] The defendant alleges that he got a person who was interested in purchasing the vessel and equipment but the bank failed to make arrangements for him to inspect the vessel and equipment. The defendant tendered in evidence his letter dated 05th July 2012 (D1) informing them that they just lost a "would be" sale of the vessel due to the inability to facilitate the interested party. The person interested in buying the vessel had later bought another vessel for \$40,000.00. However, the evidence of the plaintiff's witness is that the bank fixed another date for inspection and informed the defendant.
- [14] From the evidence adduced by both parties I do not see any negligence on the part of the plaintiff. From the time the plaintiff seized the vessel it has done its best to dispose the vessel and obtained the maximum price for the vessel and equipment.
- [15] The defendant claims \$193,559.48 as damages with interest at the rate of 15.5% from the plaintiff on the basis that it failed to maintain the vessel and to effect certain repairs.
- [16] The quantum of damages claim by the plaintiff is based on the value of the vessel given in the policy of insurance. According to the said policy the sum insured is \$200,000.00.

The sum insured cannot be taken as the actual value of the vessel. There is no evidence that this valuation was given by a qualified valuer. This is just an amount agreed by the parties as the sum insured.

[17] On the other hand the plaintiff has obtained a valuation (P22) from a qualified valuer. The vessel is valued at \$25,000.00 and the equipment are valued at \$20,000.00. The defendant in his evidence said that he did not agree with this valuation but as I said earlier, he has not obtained valuation from the qualified valuer.

[18] For these reasons I do not see any basis for the counter claim of the defendant.

[19] The plaintiff originally instituted these proceedings against three defendants. On 09th August 2018 the plaintiff discontinued the action against the 2nd and 3rd defendants and continued the action against the 1st defendant (the defendant). For the time the defendant in his written submissions submits that the action is defective since the plaintiff failed to bring the action against the correct parties.

[20] The defendant in this regard relies on Order 81 rule 1 of the High Court rules 1981 which provides:

Subject to the provisions of any enactment, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.

[21] Order 81 rule 1 does not make it imperative for a party to sue all partners of a business. It is more so when the guarantee bond states as follows:

Clause 3.3 More than one guarantor

If two or more people are named as guarantor:

- (a) 'I' refers to each of us alone and any two or more of us together;
- (b) our obligations bind each of us alone and any two or more of us together;
- and
- (c) the release of one person from his obligation does not mean that the others are also released.

- [22] From the above clause it is abundantly clear the plaintiff could sue the partners of the business jointly and/or severally.
- [23] The next issue raised by the defendant is that there is a discrepancy in the interest rate claimed by the plaintiff. In the Facility schedule of the Loan offer letter the interest rate is 12% per annum on the first \$325,000.00 and 17.5% on any excess. It also provides for 2% default interest.
- [24] In the original statement of claim the interest rate claimed by the plaintiff was 15.5% per annum. However, the interest rate has been reduced to 9.5% per annum. The interest rate claimed by the plaintiff in the amended statement of claim is very much less than the interest rate agreed upon by the parties. Therefore, the defendant is not entitled to complain that any injustice would be done to him due to the discrepancy in the interest rates claimed in the statement of claim, offer letter and in the amended statement of claim.
- [25] For the aforesaid reasons the court makes the following orders.

ORDERS

1. The defendant is ordered to pay the plaintiff \$195,956.41 with interest at the rate of 9.5% per annum from 01st April 2014 until the entire sum is paid in full.
2. The defendant is also ordered to pay plaintiff \$10,000.00 as costs.



27th April 2020


Lyone Seneviratne

JUDGE